



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Hon. D. K. Kemei - J.)

CIVIL APPEAL NO. E18 OF 2021

ABEDNEGO MUTILI MUIA.....APPELLANT

VERSUS

ITUMO MUASYA & AGNES NZULA ITUMO

(Legal representatives of the Estate of

FRANSISCA KATILE KATUMO (Deceased).....RESPONDENTS

RULING

1. Before the court is a Notice of Motion dated 24th February 2021 filed under certificate of urgency seeking the following orders:-

1. Spent

2. THAT the Honourable Court be pleased to make an ex-p-arte order staying execution of the judgement delivered on 16.2.2021 in SPMCC No.104 of 2020 at Kangundo, pending the inter partes hearing of this application.

3. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to stay execution of the aforesaid judgement.

4. THAT pending the hearing and determination of this Appeal, this Honourable court be pleased to stay execution of the aforesaid judgement.

2. The application is based on grounds inter alia; *Appellant has an arguable appeal which has high chances of success; If stay is not granted the Respondent will proceed to execute the decree and that the appeal will be rendered nugatory causing the Appellant to suffer irreparable damage; the application is made without unreasonable delay and that the Appellant is willing to provide security for due performance of the decree.*

3. The Appellant deposes in his supporting affidavit that there is no stay of execution of judgement dated 16.2.2021 entered against him for a judgement sum of Kshs. 5,151,650/- and computed costs of Kshs. 238,896/- hence a threat of execution against him. The averment was based on a letter dated 16.02.2021 marked as 'AMM1' from Respondent's advocates Messrs AB Shah Advocates. Further through a letter dated 23.02.2021 marked AMM2 from the said advocates, the Respondent has threatened to send auctioneers to attach Appellant's property and apply for execution by way of arrest and committal to civil jail.

4. It is averred further by the Appellant that the Respondents are not wealthy persons and hence the Appellant will suffer irreparable loss as they will not be able to refund the decretal sum if paid to them and the appeal is successful in the end. The Appellant deposes that he will be condemned unheard. He avers that the Respondents will not suffer prejudice if conditional stay orders are granted and if the orders sought are not granted the Appellant will suffer much more loss as compared to the Respondent. It is deposed that the appeal has good chances of success and that he is willing to provide security for the due performance of the decree. The Appellant expressed his profound surprise that the trial magistrate held the deceased's earning to be Kshs. 20,000/- per month when the evidence was that she was earning Kshs. 9,000/- per month. He was also surprised that the trial magistrate gave a 20 year working life to the deceased and used a 30-year multiplier which led to a manifestly high award. He attached a copy of the trial court's judgement is annexed as 'AMM 3'.

5. In opposing the application, the Respondent Itumo Muasya swore a replying affidavit on 2nd March 2021. He avers that during the hearing of the case, the investigating officer blamed the Appellant for causing the accident. He deposes that the Appellant chose not to testify in court. It is deposed by the Respondent based on his advocate's advice, that the case against the Respondents was uncontroverted hence the

trial court was right to find the Appellant 100% liable. He deposes that the appeal is intentionally calculated to deny the Respondents the fruits of their judgement.

6. The Respondent deposes based on his advocate's advice, that the trial court award was within the parameters based on existing precedents as none of the parties had documents to prove the deceased's income hence the court rightly placed reliance on the multiplicand of Kshs. 20,000/- for a caretaker as opposed to Kshs. 24,485/10 provided for under the Regulation of Wages (General) (Amendment) Order 2018.

7. Based on his advocate's advice, the Respondent deposes that one of the grounds for granting stay is that the Appellant must demonstrate that the appeal is arguable and raises triable issues. He therefore deposes that the appeal is bad as the Appellant chose not to testify in court despite filing an incriminating statement.

8. He deposes that the Appellant has never interacted with him on a personal level to know his financial capacity as to whether he can refund or not the decretal amount in the event the appeal succeeds. According to the Respondent, the deceased left three young children who are in dire need of financial support under his care since the purported deceased's husband who testified in court disappeared after the hearing. The Respondent has urged the court to award him half the decretal amount and the balance to be deposited in a joint interest earning account in the names of the Appellant and Respondents firm of advocates awaiting the appeal outcome.

9. In support of the application, Appellant's counsel has filed written submissions dated 11th June 2021. Counsel submitted that the Respondent relied on hearsay evidence from the police hence the court should not have found him negligent. According to counsel, the appeal has reasonable chance of success. It is urged by counsel that the Respondent's averment that they are in dire need of money means that the Respondent has no other source of income from which they may raise funds to refund the decretal sum in the event the appeal is successful. That there is no evidence tendered by the Respondent that they are able to refund the decretal sum. Reliance was placed on the case of **Janardan D. Patel vs Bindi Shah [2021]eKLR** on the proposition that the burden is shifted to the Respondent to show that the sum will be refunded in the event the appeal succeeds.

10. According to Appellant's counsel grounds 7 to 12 of the Memorandum of Appeal, the same reveals that the award of Kshs. 5,390,546/- for loss of dependency by the trial court was inordinately high. On security given for the performance of decree, counsel submitted that the Appellant is insured by Intra Africa Assurance Limited who can offer its bond for Kshs. 3,000,000/- as the limit of the insurer's liability. Alternatively, to secure the best interest of the children, court can order 60% (Kshs. 691,200/-) of the amount that the Appellant submitted would be due as damages for loss of dependency which is enough for the maintenance of the children as the appeal is likely to be concluded within two years. According to counsel, paying 60% of Kshs. 5,390,546 will render the appeal nugatory as the Respondent will not be able to refund the decretal amount if appeal succeeds and that the Appellant will be prejudiced if a further sum is deposited in the bank considering the business needs cash flow during the pandemic times.

11. It is submitted by Respondent's counsel that the appeal on liability lacks merit hence there is no chance of success in the same. As regards whether the Appellant has satisfied the conditions set under Order 42 Rule 6(2) of the Civil Procedure Rules 2010, it is submitted that the Appellant has not substantiated that he will suffer irreparable harm as the failure to grant the stay of execution orders will amount to being condemned unheard. According to counsel, the appeal will only stop the Respondent from reaping the fruits of judgement. Counsel submitted that the Appellant's assertion that the Respondent is not wealthy hence not able to refund the decretal sum if appeal succeeds is very speculative. Reliance was placed on the case of **Socfinac Co. Ltd vs Nelphat Kimotho Muturi (2013) eKLR**. According to counsel, no evidence has been tendered before court to suggest the Respondent's incapability. In respect of security for the due performance, reliance was placed on the case of **David Mbuthia & Another vs Victoria Mwangeli Kimwalu (2017) eKLR** where the court directed the respondent be paid 50% of the decretal sum. Counsel submitted that the accident claimed the life of the deceased who was the sole bread winner of the three young children hence the court should direct the Appellant to pay at least 60% of the decretal sum to offset the huge burden of fending for the minors and the balance be held in a joint interest earning account.

12. The application is premised on Order 42 Rules 6(2) of the Civil Procedure Rules, 2010 which stipulates as follows:-

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

13. On the first condition, the court in **Tropical Commodities Suppliers Ltd and Others vs International Credit Bank Limited (in liquidation) (2004) E.A. LR 331**, defined *substantial loss* in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

14. In **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**, **Mativo J** relied on the case of **Equity Bank Ltd vs Taiga Adams Company Ltd, [2006] eKLR** to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant.”

15. However *Odunga J. in George Kimotho Ilewe Anastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in *Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto* and *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*.

16. It is submitted for the Appellant that payment of Kshs. 3,234,327/- to the Respondent who is not wealthy will cause the Appellant’s insurer substantial loss as the Respondent will not be able to refund and that if further money is deposited in the bank when the Appellant’s insurer’s business needs cash flow during the pandemic it will be unfair and unreasonable. According to the Respondent, the Appellant has not demonstrated with particularity how he will be condemned unheard if stay of execution orders are not granted.

17. The evidential burden shifted to the Respondent once the Applicant asserts his/her reasonable fears of the Respondent(s) inability to recover the decretal sum if the appeal is successful. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

18. In my view the Appellant has been able to demonstrate that its insurer will suffer substantial loss by being condemned unheard.

19. On the second condition, the trial court judgement was delivered on 16.2.2021 while the application seeking stay of execution of the judgement was filed on 26.2.2021. The application has therefore been filed without unreasonable delay.

20. The Appellant has offered security for the due performance of the decree in the form of a bond of Kshs. 3,000,000/- or in the alternative Kshs. 691,200/- submitted by the Appellant to be the amount due as damages for loss of dependency.

21. The Respondent submitted that the court should order the Appellant to pay 60% of the decretal sum of Kshs. 5,151,650/- and the balance be deposited in a joint interest earning account in the name of the Appellant’s and Respondent’s firm of advocates.

22. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another [2018] eKLR*, it was stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

23. The Respondent who is a father to the deceased as testified before the trial court has asked the court to take into consideration that the deceased’s children are minors who are in dire need of financial support as the deceased was the sole bread winner. The Respondent has suggested 60% of the decretal sum to be paid to him. He relied on the case of *David Mbutia & Another vs Victoria Mwangeli Kimwalu (2017) eKLR* where it is only quantum of damages awarded that had been challenged, *Kariuki J* ordered payment of Kshs. 361,935/= be paid to the Respondent since the Respondent would still get 60% of the amount arrived at by court. The appeal herein is challenging both liability and quantum and therefore distinguishable from the above cited decision.

24. On the other hand, I note that Kshs. 691,200/- the amount suggested by the Appellant has been plucked from the air as the same is not pleaded in the Appellant’s affidavit. Further, the Appellant has submitted that his insurer will offer bond in the sum of Kshs. 3,000,000/-. The proposals have not been pleaded in the affidavit but in the written submissions dated 11th June 2021. It is trite that submissions cannot replace evidence and parties are bound by their pleadings.

25. The court in *Absalom Dova vs Tarbo Transporters [2013] eKLR*, stated:-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

26. The Appellant has shown good faith by willing to offer security for the performance of decree. The Respondent has pleaded that they need to take care of the deceased’s children hence financial support is required. The court has to strike a balance in the matter by ensuring that the respondent is not unduly prejudiced by the stay while the appellant is also not denied from pursuing his appeal. The appellant has lodged appeal against both liability and quantum and the memorandum of appeal appears to raise germane triable issues which upon consideration might substantially affect the awards given by the trial court. However, what is not in doubt is that the respondent is not likely to come out empty handed in the end. Looking at the amounts awarded, I am of the view that a fifth thereof (1/5) comprising Kshs 1,030,330/ should be paid by the appellant to the respondent while the balance thereof shall be deposited into a joint interest earning account in the names of the advocates for the parties herein.

27. In light of the foregoing, the appellant's application dated 24/2/2021 is allowed in the following terms:

a. The Appellant is granted stay of execution of the judgement and decree of the Senior Resident Magistrate Hon. Martha Opanga at Kangundo in SPMCC No.104 of 2021 pending the hearing of the appeal on condition that the sum of Kshs 1,030,330/ is paid by the appellant to the respondent while the balance thereof is deposited into a joint interest earning account in the names of the advocates for the parties within 45 days from the date of this ruling failing which the stay shall lapse.

b. The costs of the application shall abide in the appeal.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE